THE FUTURE OF THE DEATH PENALTY: THE SEEDS OF TIME*

*John Charles Boger***

I. INTRODUCTION: LESSONS FROM THE SCOTTISH PLAY

If you can look into the seeds of time,
And say which grain will grow and which will not,
Speak then to me, who neither beg nor fear
Your favors nor your hate.[1]

It is Banquo, of course, Macbeth's loyal thane, imploring three witches who have appeared out of a foul mist on a barren heath.[2] A moment earlier, the three have hailed Macbeth, the present Thane of Glamis, calling him instead, the "thane of Cawdor" who "shalt be King hereafter."[3] What can they mean? Might these witches possess the power to see into his future? If so, what will that future bring?

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* Professor Boger delivered his oral remarks for our April 14, 2018 symposium and crafted his expanded written essay expressly to explore Justice Anthony Kennedy's jurisprudence, examining whether he might become a fifth and majority Justice in declaring contemporary state capital punishment statutes unconstitutional under the Eighth and Fourteenth Amendments. Plainly, Justice Kennedy's announcement on June 27, 2018 of his retirement from the Court undercut Professor Boger's speculation. We have nonetheless judged, as editors, that his handicraft reveals much about the current state of capital jurisprudence at the Court. The future, meanwhile, remains of greater uncertainty and surprise than anyone can fathom or foresee.

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1. WILLIAM SHAKESPEARE, MACBETH act 1, sc. 3, ll. 58–61.
2. *Id.* act 1, sc. 2, ll. 51–59.
3. *Id.* act 1, sc. 3, ll. 47–50.

It falls to the final four participants in this excellent Symposium on the American death penalty to consider some contemporary equivalents of these final two questions. Might *we* possess the power to see into the future of capital punishment in America? If so, what will that future bring? Will the Supreme Court take steps to declare its use unconstitutional? Or will its long, meandering legal history flow onward? In addressing these important questions, we work at some disadvantage, for while my colleagues are learned scholars and experienced capital practitioners, none, I believe, is a witch or wizard, nor am I.

Moreover, even were we blessed or cursed with supernatural powers, one key insight that unfolds within what actors superstitiously call The Scottish Play is that a future foretold, even by witches, remains fully as hidden as revealed.[4] To be sure, Macbeth, on the very day of his first supernatural encounter, learns that he has, indeed, been named Thane of Cawdor by King Duncan in gratitude for his bravery in battle, and we later watch him ascend to the throne of Scotland through personal treachery and murder most foul.[5]

Yet the witches' foretellings prove treacherously ambiguous. Assured that "none of woman born [s]hall harm Macbeth," that he "shall never vanquish'd be until Great Birnam [W]ood to high Dunsinane [H]ill [s]hall come against him,"[6] Macbeth is, in the end, vanquished when the murdered king's avenging son (as you well remember) instructs "every soldier [to] hew him down a bough" from Great Birnam Wood and advance under the collective branches upon Dunsinane Castle.[7] And in the crucial moment of personal confrontation, Macduff reveals to all-but-undone Macbeth, at the point of a sword, that Macduff had been "from his mother's womb [u]ntimely ripp'd," a Caesarian birth, and thus not "of woman born."[8] The future, even when foretold, is perilously uncertain.

Having first dared to compare our panel's charge with the questions propounded to *Macbeth*'s witches, allow me a moment to compare that great play's unexpected twists and turns with the now-full half-century of death penalty jurisprudence that has flowed from our Supreme Court, whose future course we have been called upon to forecast.

A quick recounting: the brilliantly conceived, five-year, national campaign initiated by the NAACP Legal Defense & Educational Fund, Inc. (LDF) in the mid-1960s[9] yielded, by 1969, an apparent 8–1 majority vote,

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4. *The Curse of the Scottish Play*, RSC, https://www.rsc.org.uk/macbeth/about-the-play/the-scottish-play (last visited Jan. 6, 2019); *The Scottish Play*, WIKIPEDIA, https://en.wikipedia.org/wiki/The_Scottish_Play (last updated Oct. 23, 2018, 12:27 PM).

5. MACBETH act 1, sc. 3, ll. 104–06.

6. *Id.* act 4, sc. 2, ll. 79–81, 92–94.

7. *Id.* act 5, sc. 4, ll. 4–7.

8. *Id.* act 5, sc. 8, ll. 12–16.

9. *See* JEFFREY L. KIRCHMEIER, IMPRISONED BY THE PAST: WARREN MCCLESKEY AND THE AMERICAN DEATH PENALTY 78–81 (2015). *See generally* EVAN J. MANDERY, A WILD JUSTICE: THE

taken privately among the Justices during an internal Supreme Court conference[10] in *Maxwell v. Bishop*, which would have struck down the Arkansas capital statute, and indeed virtually all American capital statutes, on one of two Due Process Clause grounds.[11] Yet amid disagreements, unexpected delays, an intervening presidential election, and consequent changes in the Court personnel, the tentative majority vote vanished altogether,[12] and *Maxwell* was vacated and remanded on a jury-selection ground that had not been raised in the Court.[13] Two years later, in *McGautha v. California*, Justice John Marshall Harlan declared, for six Justices, that the Due Process Clause imposed absolutely no constitutional demand on the states, either to bifurcate the guilt and sentencing proceedings in capital cases or to provide capital juries with greater sentencing guidance—this latter a task, Justice Harlan mused in cool, analytical prose, that might well be beyond all human contriving.[14] The LDF national campaign against capital punishment lay dashed virtually in pieces in a single morning.[15]

Yet scarcely a year after *McGautha*'s decisive opinion, five Justices gathered spectrally in *Furman v. Georgia*, each writing separately but somehow finding sufficient shelter under the wings of the Eighth Amendment to banish the threat of execution for 633 inmates, and thereby striking in 1972, with one collective blow, all American state capital statutes, a feat of unpredicted judicial legerdemain.[16] Yet following its unprecedented deed, the Court performed a striking pirouette a mere four years later, upholding both the general constitutionality of the death penalty and, in a trio

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DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA (2014); MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT (1973); CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 38–48 (2016).

10. LEE EPSTEIN & JOSEPH F. KOBYLKA, THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY 63, 339 n.71 (1992); MANDERY, *supra* note 9, at 79–83.

11. Maxwell v. Bishop, 257 F. Supp. 710 (E.D. Ark. 1966), *aff'd*, 398 F.2d 138 (8th Cir. 1968), *cert. granted*, 393 U.S. 997 (1968). The first of two Due Process Clause claims presented in *Maxwell* faulted the absence in the Arkansas statutes of bifurcated proceedings that would have required capital juries to consider questions of guilt or innocence first, before awaiting a second and separate proceeding, if necessary, devoted solely to the question of a proper sentence. *Id.* at 721. *Maxwell* also faulted Arkansas's statutory failure to provide any sentencing guidance to capital juries. *Id.* at 716; *see* MELTSNER, *supra* note 9, at 158–62 (summarizing the opening arguments before the Supreme Court in *Maxwell*).

12. MANDERY, *supra* note 9, at 83–96.

13. Maxwell v. Bishop, 398 U.S. 262, 264–67 (1970) (per curiam); KIRCHMEIER, *supra* note 9, at 84; MANDERY, *supra* note 9, at 82; STEIKER & STEIKER, *supra* note 9, at 84–85.

14. McGautha v. California, 402 U.S. 183, 204, 207, 213 (1971) ("To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."), *vacated*, Crampton v. Ohio, 408 U.S. 941 (1972).

15. *Id.*; *see also* Carol S. Steiker & Jordan M. Steiker, *Lessons for Law Reform from the American Experiment with Capital Punishment*, 87 S. CAL. L. REV. 733, 735–36 (2014) (discussing the LDF's loss in *McGautha*).

16. Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam); MELTSNER, *supra* note 9, at 292–93 (discussing the Justices' rational under the Eighth Amendment and calculating that 631 men and 2 women saw their death sentences evaporate).

of cases, the revised capital sentencing regimes of the States of Georgia,[17] Florida,[18] and Texas.[19]

Far from bringing constitutional closure, these zigzag doctrinal moves became merely the first in what Professor James Liebman of Columbia has since dubbed the Court's forty-year-long, "[s]low danc[e] with death"—a period during which the canniest of soothsayers, studying its early rulings, would have been hard pressed to forecast which doctrinal seeds would grow and which would wither.[20] Capital punishment for rape of an adult woman? Struck in 1977 as a constitutionally disproportionate sentence.[21] The death penalty for a felony murderer who did not himself carry out the murder? Struck in *Enmund v. Florida* in 1981,[22] only to be modified in 1987 in *Tison v. Arizona*.[23] The death penalty for juveniles? First forbidden for defendants under sixteen in *Thompson v. Oklahoma* in 1988,[24] then allowed for sixteen- and seventeen-year-olds in *Stanford v. Kentucky* in 1989,[25] only to be banned for any defendant under eighteen in *Roper v. Simmons* in 2005.[26]

Likewise, the death penalty for the "mentally retarded"? Permitted in *Penry v. Lynaugh* in 1989,[27] then later forbidden by the Court in *Atkins v. Virginia* in 2002.[28] Arbitrary or discriminatory patterns in death penalty sentencing, clearly the core concern that prompted the *Furman* Five to condemn Georgia's capital sentencing regime in 1972?[29] Allowed to continue judicially unchecked in *McCleskey v. Kemp* in 1987 despite meticulous evidence of ongoing, systemwide racial discrimination in Georgia sentencing, the strongest such empirical demonstration ever placed before the Court.[30]

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17. Gregg v. Georgia, 428 U.S. 153, 169 (1976).

18. Proffitt v. Florida, 428 U.S. 242, 259–60 (1976).

19. Jurek v. Texas, 428 U.S. 262, 276 (1976).

20. James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963–2006*, 107 COLUM. L. REV. 1, 1, 4 (2007).

21. Coker v. Georgia, 433 U.S. 584, 592 (1977).

22. Enmund v. Florida, 458 U.S. 782, 788 (1982).

23. Tison v. Arizona, 481 U.S. 137, 158 (1987).

24. Thompson v. Oklahoma, 487 U.S. 815, 838 (1988).

25. Stanford v. Kentucky, 492 U.S. 361, 380 (1989), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005).

26. *Roper*, 543 U.S. at 578.

27. Penry v. Lynaugh, 492 U.S. 302, 340 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002).

28. *Atkins*, 536 U.S. at 321.

29. *See* Furman v. Georgia, 408 U.S. 238, 249–51 (1972) (Douglas, J., concurring); *id.* at 274–77 (Brennan, J., concurring); *id.* at 309–10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring); *id.* at 364–66 (Marshall, J., concurring).

30. McCleskey v. Kemp, 481 U.S. 279, 320 (1987). Professor Welsh White, a long-time scholar of capital punishment, described the Baldus study as "the most exhaustive study of racial discrimination in capital sentencing that has ever been conducted." WELSH S. WHITE, THE DEATH PENALTY IN THE EIGHTIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT 128 (1987); *see also* Sam Kamin & Justin Marceau, *Waking the* Furman *Giant*, 48 U.C. DAVIS L. REV. 981, 1013–14 (2015) (offering the same assessment of the Baldus study some thirty years later).

These examples could be amended still further—categories of offenders whose sentences were first committed to state discretion, then constitutionally brought within the protection of the Eighth Amendment; or state capital procedures first allowed, then trimmed and revised, and later forbidden altogether.

Such unpredicted and unpredictable twists and turns were not the product, to be sure, of whim or caprice but of the turbulent interplay of powerful, often conflicting constitutional currents that flow deeply in capital cases.[31] These forces have profoundly troubled not only the waters of Eighth Amendment jurisprudence but the Justices themselves. Over the past forty-five years, three of those Justices—William Brennan,[32] Thurgood Marshall,[33] and Harry Blackmun[34]—eventually felt compelled while still sitting on the High Court to repudiate any governmental use of the death penalty once and for all. Three more Justices—Lewis Powell,[35] John Paul Stevens,[36] and apparently, Potter Stewart[37]—announced in retirement their wishes that capital punishment would cease forever. Dare I suggest that, like unto Lady Macbeth, though without any of her moral culpability, their judicial deeds once done, these Justices came deeply to rue the consequences of their own capital acts.[38]

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31. *See, e.g.*, *Furman*, 408 U.S. 238 (illustrating the Justices' difference of opinion regarding the state of the Eighth Amendment).

32. KIRCHMEIER, *supra* note 9, at 228; *see, e.g.*, Gregg v. Georgia, 428 U.S. 227, 227–31 (1976) (Brennan, J., dissenting) (disagreeing with the death sentences upheld by the Court in the Georgia, Florida, and Texas cases under consideration).

33. *Gregg*, 428 U.S. at 231–41 (Marshall, J., dissenting) (disagreeing with the Court's holding in the Georgia, Florida, and Texas cases on similar grounds as Justice Brennan).

34. Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) (concluding "that the death penalty experiment has failed," and announcing that "[f]rom this day forward, I no longer shall tinker with the machinery of death"); *see* KIRCHMEIER, *supra* note 9, at 228–31.

35. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 451 (2001) (reporting that Justice Powell had "come to think that capital punishment should be abolished" and had expressed regret over his opinion for the majority in *McCleskey v. Kemp*, rejecting the statistical evidence of continuing racial discrimination in Georgia's capital sentencing system); *see also* John C. Jeffries, Jr., Opinion, *A Change of Mind that Came Too Late*, N.Y. TIMES, June 23, 1994, at A23 (discussing how Justice Powell changed his position on capital punishment after retiring from the Court).

36. JOHN PAUL STEVENS, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION 123 (2014) (proposing a modification of the Eighth Amendment explicitly to name the death penalty as among the cruel and unusual punishments forbidden by the Amendment). Justice Stevens had earlier authored a concurring opinion in a 2008 case, *Baze v. Rees,* in which he acquiesced in the use of the death penalty on grounds of stare decisis, despite finding that it violates at least four constitutional principles the Court had previously embraced in upholding the penalty. *See* Baze v. Rees, 553 U.S. 35, 75 (2008) (Stevens, J., concurring).

37. KIRCHMEIER, *supra* note 9, at 295.

38. WILLIAM SHAKESPEARE, MACBETH act 5, sc. 3, ll. 20–51.

II. THE JUSTICES' EVOLVING TREATMENT OF THE DEATH PENALTY

How can we then, today, propose to look deep below the surface of currents so swift, so turbulent, and so uncertain and somehow predict the death penalty's judicial future?

These initial misgivings now shared with you, forgive me one more misgiving: what Court must we predict? It is no longer the Burger Court, nor the Rehnquist Court (both far better known to me as a former capital practitioner), nor even the Roberts Court *with* Justice Scalia, now untimely departed.[39] Neither is it the Roberts Court with Justice Merrick Garland, who was denied consideration by the United States Senate.[40] Is it the Court of mid-April 2018, with the addition of the newest Justice, Neil Gorsuch,[41] or must we also predict whether Anthony Kennedy might announce his departure at the close of the current Term?[42] And if so, must we foretell whether a Republican Senate will affirm President Trump's successor nominee?[43] Or whether instead a newly-elected Democratic Senate majority will conceivably return tit-for-tat, refusing to confirm any Trump nominee not to their liking until the people can be heard in the 2020 presidential

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39. *See* DAVID A. KAPLAN, THE MOST DANGEROUS BRANCH: INSIDE THE SUPREME COURT'S ASSAULT ON THE CONSTITUTION 1–11 (2018); Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html.

40. Editorial, *The Senate's Confirmation Shutdown*, N.Y. TIMES (June 9, 2016), https://www.nytimes.com/2016/06/09/opinion/the-senates-confirmation-shutdown.html.

41. Matt Flegenheimer, *Senate Republicans Deploy 'Nuclear Option' to Clear Path for Gorsuch*, N.Y. TIMES (Apr. 6, 2017), https://www.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html.

42. Adam Liptak, *Will Anthony Kennedy Retire? What Influences a Justice's Decision*, N.Y. TIMES (Feb. 19, 2018), https://www.nytimes.com/2018/02/19/us/politics/anthony-kennedy-retirement.html?. Needless to say, Justice Kennedy did indeed announce his retirement in June 2018, two months after the Texas Tech Criminal Law Symposium, and just after my Article was initially submitted to the editors of the *Law Review*. *Anthony Kennedy Retires from Supreme Court, and McConnell Says Senate Will Move Swiftly on a Replacement*, N.Y. TIMES (June 27, 2018), https://www.nytimes.com/2018/06/27/us/politics/anthony-kennedy-supreme-court-live-briefing.html. Senate Majority Leader Mitch McConnell, in turn, later proved himself no wizard when predicting a quick confirmation for Justice Kavanaugh. *See, e.g.*, Nicholas Fandos & Sheryl Gay Stolberg, *Trump Agrees to Open 'Limited' F.B.I. Investigation into Accusations Against Kavanaugh*, N.Y. TIMES (Sept. 28, 2018), https://www.nytimes.com/2018/09/28/us/politics/brett-kavanaugh-senate-judiciary.html (detailing delays that accompanied the Senate consideration of Supreme Court nominee Brett Kavanaugh); *Quotation of the Day: Final Vote Is Delayed – Dissent Rises in Ranks of G.O.P.*, N.Y. TIMES (Sept. 28, 2018), https://www.nytimes.com/2018/09/28/todayspaper/quotation-of-the-day-final-vote-is-delayed-dissent-rises-in-ranks-of-gop.html.

43. Nicholas Fandos & Sheryl Gay Stolberg, *Kavanaugh Vote on Friday Will Be a Showdown in the Senate*, N.Y. TIMES (Oct. 4, 2018), https://www.nytimes.com/2018/10/04/us/politics/brett-kavanaugh-supreme-court.html; Fandos & Stolberg, *supra* note 42.

election?[44] There was a time when no one would bother to conjure up such dispiriting scenarios.[45] We have, lamentably, moved beyond that time.

A. Justice Breyer

Let me arbitrarily set for myself, though, the less-politically-charged task of predicting the future course of the Court as of April 14, 2018—the date of our Symposium. To predict that future, of course, one must be able to count to five, for a bare majority of the Nine can, and often has, shaped the constitutional future of the death penalty. The count is made easier by two circumstances, both of which have been mentioned earlier in this Symposium. The first is the intriguing 2015 dissent by Justice Steven Breyer in *Glossip v. Gross*,[46] a case granted review to consider the mix of lethal chemicals used in the actual execution process.[47] Justice Breyer, a former Justice Goldberg clerk[48] and senior member of the Roberts Court, writing for himself and Justice Ginsburg not only dissented on the narrow issue, the propriety of the State's drugs, but also urged the Court to use *Glossip* for a broader purpose—a "full briefing on a more basic question: whether the death penalty violates the Constitution."[49]

"Almost 40 years of studies, surveys, and experience strongly indicate," Justice Breyer observed, that the Court's key assumption in *Gregg*, *Proffitt* and *Jurek*—"that the constitutional infirmities in the death penalty could be healed"—has failed.[50] He purported to discern "three fundamental constitutional defects [in the sentencing regimes]: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose," which together have led "(4) most places within the United States [to] have abandoned its use."[51] To support his serious unreliability charge, Justice Breyer recounted widely known instances where DNA evidence and other forensic tools sufficed to exonerate death-sentenced inmates, proving them factually innocent of their

44. Carl Hulse, *That Supreme Court Stonewall May Not Crumble Anytime Soon*, N.Y. TIMES (Nov. 3, 2016), https://www.nytimes.com/2016/11/04/us/politics/that-supreme-court-stonewall-may-not-crumble-anytime-soon.html (suggesting that at least some Republican leaders would have been prepared to deny Hillary Clinton any vote on her Supreme Court nominees for four years if possible).

45. *Id.*

46. Glossip v. Gross, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., dissenting).

47. *Id.* at 2731 (majority opinion).

48. Laura Krugman Ray, *The Legacy of a Supreme Court Clerkship: Stephen Breyer and Arthur Goldberg*, 115 PA. ST. L. REV. 83 (2010).

49. *Glossip*, 135 S. Ct. at 2755 (Breyer, J., dissenting).

50. *Id.*

51. *Id.* at 2755–56.

crimes,[52] as well as very high rates of federal and state court reversals of capitally sentenced inmates.[53]

To underline the penalty's apparent arbitrariness, Justice Breyer pointed toward its infrequent imposition even in those states with active capital statutes,[54] and the ostensible failure of those state statutes to single out "the worst of the worst" among capital offenders.[55] Like a penitent reading from the Anglican Book of Common Prayer,[56] Justice Breyer lamented that "factors that most clearly ought to affect application of the death penalty—namely, comparative egregiousness of the crime—often do not," while "circumstances that ought *not* to affect application of the death penalty, such as race, gender, or geography, often *do*."[57]

In addition, Justice Breyer shared his anguish over long delays in carrying out executions of death-sentenced inmates, delays now extending over eighteen years or more on average, years often spent in solitary confinement, which have added, in Justice Breyer's view, to the cruelty of the punishment while diminishing its penological objectives—either deterrence or retribution.[58] Yet to cut short the procedure-filled delays, Justice Breyer observed, would allow the execution of some inmates who would almost certainly be found innocent or convicted despite grave constitutional errors later brought to light.[59]

After cataloguing this roster of concerns, Justice Breyer's dissent closed by all-but-tipping its hand: "For the reasons I have set forth in this opinion, I believe it highly likely that the death penalty violates the Eighth Amendment. At the very least, the Court should call for full briefing on the basic question."[60] A striking dissent, one since reasserted in a number of capital cases,[61] but still one commanding only two votes.[62]

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52. *Id.* at 2756–58.

53. *Id.* at 2759. Justice Breyer noted a 68% overall reversal rate in capital cases between 1973 and 1995. *Id.*

54. *Id.* at 2772–75.

55. *Id.* at 2760 (quotations omitted).

56. THE BOOK OF COMMON PRAYER 41–42 (Church Publ'g Inc. 2007) (1549) "We have left undone those things which we ought to have done; And we have done those things which we ought not to have done; And there is no health in us." *Id.*

57. *Glossip*, 135 S. Ct. at 2760 (Breyer, J., dissenting).

58. *Id.* at 2764–70.

59. *Id.* at 2770–72.

60. *Id.* at 2776–77.

61. *See* Smith v. Ryan, 137 S. Ct. 1283, 1283 (2017) (mem.); Sireci v. Florida, 137 S. Ct. 470, 471 (2016) (Breyer, J., dissenting) (noting that Sireci has been under threat of execution for forty years, and adding that "individuals who are executed are not the 'worst of the worst,' but, rather, are individuals chosen at random, on the basis, perhaps of geography, perhaps of the views of individual prosecutors, or still worse, on the basis of race"); Brooks v. Alabama, 136 S. Ct. 708, 708 (2016) (Breyer, J., dissenting) (urging that "[t]he unfairness inherent in treating this case differently from others which used similarly unconstitutional procedures only underscores the need to reconsider the validity of capital punishment under the Eighth Amendment").

62. *Glossip*, 135 S. Ct. at 2755 (Breyer, J., dissenting). Justice Breyer was joined in the *Glossip* dissent by Justice Ginsburg. *Id.*

Ah, but there is a second opinion, a more recent one, part of a March 19, 2018 denial of certiorari in an Arizona case, *Hidalgo v. Arizona*.[63] The highly unusual, eight-page statement that accompanied the Court's otherwise bare order denying certiorari came again from Justice Breyer, this time joined not only by Justice Ginsburg but also by Justices Sotomayor and Kagan.[64] These four, speaking through Breyer, agreed that *Hidalgo* presented "an important Eighth Amendment question," to wit, "[w]hether Arizona's capital sentencing scheme, which includes so many aggravating circumstances that virtually every defendant convicted of first-degree murder is eligible for death, violates the Eighth Amendment."[65]

A constitutionally sufficient, post-*Furman* capital sentencing regime, the four Justices declared, requires first an "eligibility decision" to be made by the state's legislative branch that "genuinely narrow[s] the class of persons eligible for the death penalty and . . . reasonably justif[ies] the imposition of a more severe sentence on the defendant compared to others found guilty of murder."[66] Hidalgo's petition alleged that the Arizona Legislature has, in fact, defined capital murder so broadly and enlarged the roster of "statutory aggravating circumstances" so widely that virtually every first-degree murder case in Arizona is included—indeed, 856 of 866 (98%) of all cases brought in Maricopa County, Phoenix, between 2002 and 2012.[67] Hidalgo proffered substantial preliminary evidence for this pattern and sought a full hearing to lay bare his proof, which the Arizona courts denied below.[68] It was apparently *because of* this barren record that Justice Breyer and his colleagues deferred consideration of the merits and joined in the denial of certiorari:

> Evidence of this kind warrants careful attention and evaluation. . . . Capital defendants may have the opportunity to fully develop a record with the kind of empirical evidence that the petitioner points to here. And the issue presented in this petition will be better suited for certiorari with such a record.[69]

This statement appears to be an engraved judicial invitation for further review. Four Justices, enough under the Court's rules to grant certiorari and order full consideration on its merits, publicly agreed that *Hidalgo* presents a serious constitutional issue, albeit one best considered after development of a full evidentiary record in state or federal post-conviction proceedings.[70]

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63. Hidalgo v. Arizona, 138 S. Ct. 1054 (2018).
64. *Id.*
65. *Id.* (quotations omitted).
66. *Id.* at 1055 (quotations omitted) (citing Lowenfield v. Phelps, 484 U.S. 231, 244 (1988)).
67. *Id.* at 1055–56 (quotations omitted).
68. *Id.* at 1056.
69. *Id.* at 1057.
70. *See* Rogers v. Mo. Pac. R.R., 352 U.S. 521, 527–29 (1957) (Frankfurter, J., dissenting) (explaining the Court's practice of granting certiorari to review a lower court's decision only if four Justices vote to hear the appeal).

Hidalgo's counsel of record, Neal Katyal, former Acting Solicitor General of the United States, and his major Washington, D.C. firm that joined in Hidalgo's defense, doubtless understand the task before them.[71] All to be continued.

Several of this Symposium's fellow-presenters, including Professor Samuel Kamin, have earlier published thoughtful articles on the very constitutional defect asserted in *Hidalgo*, urging a reconsideration of the often-neglected "'narrowing' requirement" of *Furman v. Georgia*.[72] One major study co-authored by Professor Kamin empirically documents Colorado's long-standing neglect of that requirement,[73] a flaw which mars the capital statutes not only of Colorado but apparently also of California[74] and other states as well.[75] I will leave to Professor Kamin an elaboration of his findings.

B. Justice Sotomayor

Beyond *Hidalgo*, Justice Sotomayor has recently identified another broad problem facing capital sentences imposed under the very Florida statute originally upheld in 1976 in *Proffitt v. Florida*.[76] In a series of dissents from denials of certiorari, occasionally joined by Justices Breyer and Ginsburg, the most recent of which—*Guardado v. Jones*[77] and *Cozzie v. Florida*[78]—were announced shortly before this Symposium, Justice Sotomayor has insisted that *Hurst v. Florida*—a two-year-old decision by the Court faulting Florida's statutory practice of informing capital juries that their sentencing deliberations and votes on aggravating and mitigating factors were merely advisory recommendations to the trial judge, who made the final life-or-death decision[79]—has brought many, if not most, of Florida's prior capital sentences into grave constitutional doubt.[80] Since Florida presently

71. *Biography of Neal Katyal*, HOGAN LOVELLS, https://www.hoganlovells.com/neal-katyal (last visited Jan. 6, 2019).

72. *Hidalgo*, 138 S. Ct. at 1054; *see, e.g.*, Kamin & Marceau, *supra* note 30, at 996, 1002; Justin Marceau et al., *Death Eligibility in Colorado: Many Are Called, Few Are Chosen*, 84 U. COLO. L. REV. 1069 (2013).

73. Marceau, et al., *supra* note 72, at 1084–90.

74. *See* Steven F. Shatz & Naomi R. Shatz, *Chivalry Is Not Dead: Murder, Gender, and the Death Penalty*, 27 BERKELEY J. GENDER L. & JUST. 64, 84 (2012) (reporting on the small percentages of death-eligible homicides under California law and the very small percentage of such cases in which death is actually imposed).

75. Kamin & Marceau, *supra* note 30, at 1015 tbl.1 (reporting data on other states).

76. Proffitt v. Florida, 428 U.S. 242 (1976).

77. Guardado v. Jones, 138 S. Ct. 1131, 1132 (2018) (Sotomayor, J., dissenting).

78. *Id.*

79. Hurst v. Florida, 136 S. Ct. 616, 622 (2016).

80. *Id.* at 624. The *Hurst* decision, Justice Sotomayor notes, relied on *Ring v. Arizona*, in which seven members of the Court agreed that a jury, not the trial judge, must find the statutory aggravating circumstances necessary to make a defendant eligible to receive a sentence of death because aggravating factors work like elements of a crime for Sixth Amendment purposes, and, therefore, under *Apprendi v.*

houses the nation's second largest death row population with 374 inmates as of July 1, 2017, doubts about its sentencing proceedings cast an outsized shadow.[81]

C. Justice Gorsuch

Still, this stirring of four Justices in *Hidalgo* and the Florida sentencing procedure cases aside, where lies a fifth vote? In my judgment, one need not spend long pondering the future role of Justice Neil Gorsuch. His few capital punishment decisions as a Tenth Circuit federal judge displayed a procedurally deferential approach to state capital trials and sentencing prerogatives.[82] Since his Senate confirmation on April 4, 2017, he has casted votes in several capital cases that would likely have pleased his predecessor, Justice Scalia, and situate him comfortably alongside Justices Alito and Thomas as members of the most conservative wing of the present Court on criminal justice issues.[83]

New Jersey, must be found by a jury. *Id.* at 621; Ring v. Arizona, 536 U.S. 584 (2002); Apprendi v. New Jersey, 530 U.S. 466 (2000). Since *Hurst*, in 2016, applied *Ring* to Florida's capital statutes, inmates sentenced by trial judges under Florida's prior system did not, in Justice Sotomayor's view, receive full Sixth Amendment protections. *Hurst*, 136 S. Ct. at 621. In response, Florida has argued that where its capital juries had unanimously agreed to recommend one or more aggravating circumstances, that would suffice to meet the *Hurst–Ring* demand. *Id.* at 622. Justice Sotomayor has more recently invoked the Court's 1985 decision in *Caldwell v. Mississippi*, which held that any "uncorrected suggestion [to the trial jury] that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role," in contravention of the Eighth Amendment. Caldwell v. Mississippi, 472 U.S. 320, 333 (1985); *Guardado*, 138 S. Ct. at 1132. In earlier dissents from denial of certiorari in *Middleton v. Florida*, *Tundidor v. State*, and *Truehill v. Florida*, Justice Sotomayor had been variously joined in her *Hurst* views by Justices Breyer and Ginsburg. Middleton v. Florida, 138 S. Ct. 829, 829–30 (2018) (Sotomayor, J., dissenting); Truehill v. Florida, 138 S. Ct. 3, 3–4 (2017) (Sotomayor, J., dissenting).

81. DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2017: YEAR END REPORT 3 (2018), https://deathpenaltyinfo.org/documents/2017YrEnd.pdf.

82. *See, e.g.*, Eizember v. Trammell, 803 F.3d 1129 (10th Cir. 2015), *cert. denied sub nom.* Eizember v. Duckworth, 136 S. Ct. 2468 (2016) (dismissing a claim that two jurors should have been dismissed because they had expressed unacceptable bias in favor of the death penalty by stressing the "double deference" a federal court owes to the trial judge's superior position in assessing juror demeanor and the high standards for post-conviction review set by the federal habeas corpus statutes).

83. *See* McGehee v. Hutchinson, 137 S. Ct. 1275, 1276 (2017) (Sotomayor, J., dissenting) (disagreeing with the Court's denial of certiorari and denial of a stay; joined by Justice Ginsburg); *id.* at 1276–77 (Breyer, J., dissenting) (disagreeing with the Court's denial of a stay). On April 20th, just over two weeks after his confirmation, Justice Gorsuch cast a deciding fifth vote to deny stays of execution sought among eight Arkansas capital inmates in connection with their petitions for certiorari or rehearing, which were filed after the Arkansas governor scheduled eight executions in ten days. *See id.* Hours after that vote, Ledel Lee was lethally injected, becoming Arkansas's first execution since 2005. *See* Alan Blinder & Manny Fernandez, *Arkansas Puts Ledell Lee to Death, in Its First Execution Since 2005*, N.Y. TIMES (Apr. 21, 2017), https://www.nytimes.com/2017/04/21/us/arkansas-death-penalty-ledell-lee-execution.html.

Two months later, Justice Gorsuch joined a dissent in another sharply divided case in which the majority ruled that an Alabama trial court had not properly followed the Court's thirty-two-year-old decision in *Ake v. Oklahoma*, which affords an indigent defendant an expert "sufficiently available to the defense and independent from the prosecution to effectively 'assist in [the] evaluation, preparation, and

Yet before writing off the more conservative wing of the Roberts Court as an altogether unreachable locus of a fifth vote, let me note that Symposium co-panelist Lee Kovarsky somehow won a brand-new Supreme Court victory, on March 21, 2018, for Carlos Ayestas, a Texas capital inmate sentenced in 1997 for a brutal murder during a crime spree, by eliciting a unanimous opinion from former federal prosecutor, now Justice Samuel Alito.[84] I could never have predicted nor can explain that remarkable outcome—congratulations to Professor Kovarsky—a decision which only underlines this Article's overall theme of the uncertainty that haunts the capital sphere.

Back again to the merits, though. If a fifth vote to end the death penalty is not to come from either Justices Gorsuch, Alito, Thomas, or Chief Justice Roberts,[85] who, beyond the *Glossip–Hidalgo* four, might cast that vote? Perforce, it must be Justice Anthony Kennedy or no present member of the Court at all.

D. Justice Kennedy

1. His Independent Jurisprudential Approach

Justice Anthony Kennedy is an intriguing possibility. In several other areas of constitutional law, he has cast decisive votes and has not shied away

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presentation of the defense'" case on mental health issues. McWilliams v. Dunn, 137 S. Ct 1790, 1793 (2017) (quoting Ake v. Oklahoma, 470 U.S. 68, 92 (1985)).

One week later, Justice Gorsuch joined a 5–4 majority opinion by Justice Thomas in *Davila v. Davis*, which held that a capitally sentenced inmate in Texas had waived his constitutional objection to a jury instruction, albeit properly preserved by his defense attorney at trial and later presented in federal habeas corpus proceedings, when neither his appellate lawyer nor his post-conviction counsel had pursued the claim. Davila v. Davis, 137 S. Ct. 2058, 2058 (2017).

More recently, Justice Gorsuch joined a three-Justice dissent (Justices Alito, Thomas, and Gorsuch, but not Roberts or Kennedy, who joined the majority) in *Tharpe v. Sellers*, remanding to the lower courts a Georgia death sentence marred by evidence that a white juror had later acknowledged, in a signed (but unsworn) affidavit secured after the trial, that he had placed the defendant in the category of "N[**]gers" and "wondered if black people even have souls." Tharpe v. Sellers, 138 S. Ct. 545, 548 (2018) (per curiam). The decision reflected a classic disagreement between Justices concerned principally with the prospect of racial discrimination and against Justices whose greater concern is in the scrupulous preservation of formal judicial and statutory bars to federal post-conviction review of state criminal proceedings. *Id.*

84. Ayestas v. Davis, 138 S. Ct. 1080, 1085 (2018).

85. Chief Justice Roberts has regularly been found among the conservative wing of the Court in cases addressing capital punishment issues. *See, e.g.*, *McWilliams*, 137 S. Ct. at 1801 (joining the three dissenters who would have rejected, on procedural grounds, the claim of a mentally challenged defendant that he was entitled to the expert assistance of a defense team psychiatrist to prepare his defense at trial); Kennedy v. Louisiana, 554 U.S. 407, 447 (2008) (Chief Justice Roberts joining the three dissenters who would have upheld the constitutionality of a death sentence for the non-lethal rape of a child); Kansas v. Marsh, 548 U.S. 163, 165 (2006) (5–4 decision) (upholding a Kansas sentencing provision that automatically imposed a death sentence if jurors concluded that aggravating and mitigating factors in a case stood in equipoise).

from expressing independent views.[86] In affirmative action cases, for example, it is Justice Kennedy who has steadfastly refused to join a plurality of four, including Chief Justice Roberts and Justices Scalia, Thomas, and Alito, who claim that the Equal Protection Clause forbids all state use of racial classifications except to remedy prior proven discrimination.[87] Justice Kennedy set an independent course not only in the 2007 *Parents Involved in Community Schools* case[88] but also in two higher education, affirmative action decisions decided in 2013 and 2016 in *Fisher v. University of Texas at Austin*,[89] both authored by Justice Kennedy where he has set out a broader, more permissive view than his conservative colleagues.

Beyond the Equal Protection Clause, Justice Kennedy has pursued a well-charted independent course in the abortion cases, where he joined Justices O'Connor, Souter, Blackmun, and Stevens, to the surprise of some, to uphold the practice in several key decisions in the 1990s.[90] Then to the surprise of others, he joined more conservative Justices in upholding the federal Partial-Birth Abortion Ban Act in *Gonzales v. Carhart* in 2007.[91]

Perhaps Justice Kennedy's most well-known constitutional journey began with his 1996 decision in *Romer v. Evans*, using the Equal Protection Clause's "rational basis" test, traditionally a toothless tiger, to strike a Colorado statewide amendment that purported to forbid the state or any locality from enacting a statute or ordinance to give homosexuals, lesbians,

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86. *See, e.g.*, *Kennedy*, 554 U.S. at 412.

87. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720–22 (2007). Chief Justice Roberts recites two interests previously recognized by a majority of the Court as sufficiently "compelling" to meet heightened scrutiny standards under the Equal Protection Clause: first, "remedying the effects of past intentional discrimination" and second, "diversity in higher education . . . ." *Id.* at 720–21. An interest that Justices Scalia, Thomas, Alito, and the Chief Justice have declined to recognize. *See, e.g.*, Fisher v. Univ. of Tex., 136 S. Ct. 2198, 2215, 2220–43 (2016) (holding the university's admission program did not violate equal protection).

88. *Parents Involved in Cmty. Schs.*, 551 U.S. 701. In his concurring opinion, Justice Kennedy offered his

> respectful submission that parts of the opinion by [The Chief Justice] imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account. The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race. The plurality's postulate that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race," *ante*, at 2767–68, is not sufficient to decide these cases. Fifty years of experience since *Brown v. Board of Education*, 347 U.S. 483 (1954), should teach us that the problem before us defies so easy a solution. School districts can seek to reach *Brown*'s objective of equal educational opportunity. The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.

Id. at 787–88 (Kennedy, J., concurring).

89. *See generally Fisher*, 136 S. Ct. 2198; Fisher v. Univ. of Tex., 570 U.S. 297 (2013).

90. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 838 (1992); *see* Chris Whitman, *Looking Back on* Planned Parenthood v. Casey, 100 MICH. L. REV. 1980, 1982–83 (2002).

91. 18 U.S.C. § 1531 (2000 & Supp. IV 2003); Gonzales v. Carhart, 550 U.S. 124, 132 (2007).

or bisexuals legal protection from discrimination.[92] Seven years later, in 2003, Justice Kennedy led a group of six Justices in *Lawrence v. Texas* in declaring that the liberty interest guaranteed by the Due Process Clause prevents states from criminalizing private, homosexual conduct, despite the Court's contrary conclusion announced in 1984 in *Bowers v. Hardwick*, a case he and the *Lawrence* Court expressly overruled.[93] Explaining his methodology in *Lawrence*, Justice Kennedy wrote:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[94]

This openness to constitutional reevaluation led Justice Kennedy in 2013 to overturn the federally applicable portion of the Defense of Marriage Act in *United States v. Windsor*, writing for himself and Justices Breyer, Ginsburg, Sotomayor, and Kagan.[95] Two years later, he affirmed the universal right to same-sex marriage in *Obergefell v. Hodges* under the Due Process and Equal Protection Clauses, speaking again for a five-Justice majority—comprising the *Glossip–Hidalgo* four with himself as the fifth, deciding vote.[96]

In *Obergefell*, Justice Kennedy carefully explored the considerations he believes should inform the Court as it weighs any decision to overturn democratically arrived-at decisions by state or federal legislatures.[97] His perspective, offered for five Justices, is worth review here:

> There may be an initial inclination in these cases to proceed with caution—to await further legislation, litigation, and debate. The respondents warn there has been insufficient democratic discourse before deciding an issue so basic as the definition of marriage. . . .

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92. Romer v. Evans, 517 U.S. 620, 626–32, 639 (1996); *see* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1439–46 (Foundation Press ed., 2d ed. 1988); Gerald Gunther *The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18–19 (1972).

93. Lawrence v. Texas, 539 U.S. 558, 578 (2003); Bowers v. Hardwick, 478 U.S. 186 (1986).

94. *Lawrence*, 539 U.S. at 578–79.

95. 110 STAT. 2419 § 3 (amending the Dictionary Act of the United States Code, 1 U.S.C. § 7, to define "marriage" and "spouse" to consist of "only a legal union between one man and one woman as husband and wife"); United States v. Windsor, 570 U.S. 744, 753 (2013).

96. Obergefell v. Hodges, 135 S. Ct. 2584, 2602–05 (2015). *See generally* Hidalgo v. Arizona, 138 S. Ct. 1054 (2018) (mem.); Glossip v. Gross, 135 S. Ct. 2726 (2015).

97. *Obergefell*, 135 S. Ct at 2604–06.

> Yet there has been far more deliberation than this argument acknowledges. There have been referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings. There has been extensive litigation in state and federal courts. . . . This has led to an enhanced understanding of the issue—an understanding reflected in the arguments now presented for resolution as a matter of constitutional law.
>
> Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. . . . Indeed, it is most often through democracy that liberty is preserved and protected in our lives. But . . . "[t]he freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power." Thus, when the rights of persons are violated, "the Constitution requires redress by the courts," notwithstanding the more general value of democratic decisionmaking.[98]

Some version of Justice Kennedy's ideas and language from *Obergefell* will likely find their way into merits briefs prepared by capital defendants who hope to challenge the constitutionality of the death penalty—at least to any future Court of which Justice Kennedy is a member.

2. His Votes Against the Death Penalty

Fresh from our whirlwind review of Justice Kennedy's pathbreaking decisions in other constitutional areas, let us now home in on his specific capital decisions, considering whether any plausible grounds emerge there for imagining his possible participation as a fifth vote to end the death penalty altogether. Two major decisions loom at once, and both involve changes of the Court's direction.[99] The first is the move alluded to earlier, from a stance permitting states to execute the mentally retarded, in *Penry v. Lynaugh* (by a 5–4 vote) in 1989, to one banning the practice in 2002 (by another 5–4 vote), in *Atkins v. Virginia*.[100] Similarly, the Court that once permitted states to execute juveniles aged sixteen or seventeen by a 5–4 vote in *Stanford v. Kentucky* in 1989 changed its constitutional mind (5–4) in 2005, in *Roper v. Simmons*.[101] Important for our diagnostic purposes is that Justice Kennedy was in the majority in all four cases; he initially voted to uphold the executions of mentally retarded and juvenile offenders in the late 1980s but subsequently shifted his views on both subjects by the early 2000s.[102]

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98. *Id.* at 2605 (alteration in original) (citations omitted).

99. Atkins v. Virginia, 536 U.S. 304 (2002); Penry v. Lynaugh, 492 U.S. 302 (1989).

100. *Atkins*, 536 U.S. at 321; *Penry*, 492 U.S. at 340.

101. Roper v. Simmons, 543 U.S. 551, 578 (2005); Stanford v. Kentucky, 492 U.S. 361, 380 (1989).

102. *Compare Roper*, 543 U.S. 551 (holding the execution of juveniles to be unconstitutional), *and Atkins*, 536 U.S. 304 (holding the execution of mentally retarded criminals to be unconstitutional), *with*

Even more pointedly, Justice Kennedy himself took pen in hand to write the *Roper* decision, where he explained his methodology as well as his revised conclusion.[103] As his methodological guide, Justice Kennedy began with the Court's oft-cited 1958 decision in *Trop v. Dulles*, which instructed the Court in Eighth Amendment cases to examine not only the constitutional text but "history, tradition and precedent," noting that "'the evolving standards of decency that mark the progress of a maturing society' [help] to determine which punishments are so disproportionate as to be cruel and unusual."[104] A review of these "evolving standards" included for Justice Kennedy at "[t]he beginning point . . . a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question."[105] Justice Kennedy added that the Court must also, thereafter, "in the exercise of our own independent judgment," consider as a second step whether the death penalty actually serves the penological ends on which its justification ostensibly rests.[106]

In conducting his review in *Roper*, Kennedy carefully counted states, concluding that the death penalty for juveniles had been legislatively or judicially rejected in thirty states, and actually imposed only three times in the previous ten years, even in those states which retained the death penalty on their books.[107] Moreover, five states had renounced the use of the death penalty against juveniles in recent years.[108] His conclusion, similar in constitutional method and outcome to that reached in *Atkins* for the intellectually disabled, was that objective criteria strongly suggested that "our society views juveniles . . . as 'categorically less culpable than the average criminal.'"[109] Turning to his own assessment of the justifications for the punishment, Justice Kennedy found juveniles' immaturity, susceptibility to the overwhelming influences of their sometimes chaotic and violent upbringings, and chances to become rehabilitated all supported the emerging public view that the penalty was excessive.[110] Justice Kennedy looked as well to the international consensus against the execution of juveniles; a theme I suspect my co-panelist Professor Linda Malone will likely explore in greater depth.[111]

Penry, 492 U.S. 302 (holding the execution of mentally retarded criminals to be constitutional), *and Stanford*, 492 U.S. 361 (holding the execution of juveniles to be constitutional).

103. *Roper*, 543 U.S. at 575–78.

104. *Id.* at 560–61 (citing Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion)).

105. *Id.* at 563–64.

106. *Id.* at 564, 571–72.

107. *Id.* at 564–65.

108. *Id.* at 565.

109. *Id.* at 567 (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002)).

110. *Id.* at 569–70.

111. *Id.* at 575–78. *See generally* Linda A. Malone, *The Death Knell for the Death Penalty and the Significance of Global Realism to Its Abolition from* Glossip v. Gross *to* Brumfield v. Cain, 11 DUKE J. CONST. L. & PUB. POL'Y 107 (2016).

In a more recent 5–4 opinion, *Kennedy v. Louisiana* in 2008, Justice Kennedy as author again employed his dual method, looking first at objective indicia and then conducting an independent assessment before striking down the death penalty for the rape of a child.[112] It was a chilling and repugnant crime, but one his opinion noted that could have resulted in a capital sentence in only six states and, in fact, had led to only two death sentences and no executions since at least 1964, despite statistics revealing that there were, lamentably, "almost twice the total incidents" of rape of children under twelve in the United States in 2005 as there were intentional murders of all ages.[113]

The *Kennedy v. Louisiana* opinion is significant for our purposes in a second respect. Employing a constitutional framework strikingly like the *Hidalgo* petition (and Professor Kamin's writings), Justice Kennedy added that "we have explained that capital punishment must 'be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution.'"[114]

More recently still, Justice Kennedy joined Justices Breyer, Ginsburg, Sotomayor, and Kagan to create a majority in a variety of closely divided capital cases in which procedures, employed to assess a capital inmate's mental status, were found inadequate—including *McWilliams v. Dunn*, decided 5–4 on June 19, 2017, which held that insufficient opportunity had been afforded to a criminal defendant under *Ake v. Oklahoma* to receive expert mental health assistance in preparing for trial.[115] In *Moore v. Texas*, decided 5–3 on March 28, 2017, the Court concluded that an incorrect standard had been employed by the Texas Court of Criminal Appeals in assessing whether a capital inmate was intellectually disabled under *Atkins v. Virginia* and related cases.[116] Additionally, in 2007, writing for the majority and joined by Justices Stevens, Souter, Ginsburg, and Breyer, Justice Kennedy held in *Panetti v. Quarterman* that the proceedings to determine whether a capital inmate was mentally incompetent to be executed under *Ford v. Wainwright* were constitutionally insufficient.[117]

3. His Votes for the Death Penalty

To be sure, Justice Kennedy is not an invariably reliable liberal vote on death penalty issues. In *Davis v. Ayala*, decided 5–4 on June 18, 2015, Justice Kennedy joined Justices Alito, Roberts, Scalia, and Thomas to rule that the specific procedures employed by a trial court under *Batson v. Kentucky*—to

112. Kennedy v. Louisiana, 554 U.S. 407, 412–17 (2008).
113. *Id.* at 423, 434, 438.
114. *Id.* at 420 (quotations omitted) (quoting *Roper*, 543 U.S. at 568).
115. McWilliams v. Dunn, 137 S. Ct. 1790, 1793 (2017).
116. Moore v. Texas, 137 S. Ct. 1039, 1043–44 (2017).
117. Panetti v. Quarterman, 551 U.S. 930, 934–35 (2007).

determine whether a prosecutor had exercised seven peremptory strikes against Hispanic and African American prospective jurors on an impermissible racial basis—were, even if unconstitutional, harmless error or non-prejudicial under all the circumstances.[118]

Yet even while offering his "unqualified" support for the opinion as "complete and correct," Justice Kennedy also wrote separately to voice his concern that capital inmate Ayala had been confined, awaiting execution, for more than twenty-five years, most of that time in solitary confinement.[119] Justice Kennedy observed that

> research . . . confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price . . . include[ing] anxiety, panic, withdrawal, hallucinations, self-mutilation, and suicidal thoughts and behaviors. . . .
>
> Over 150 years ago, Dostoyevsky wrote, "The degree of civilization in a society can be judged by entering its prisons.''[120]

This was a striking and highly public expression of empathy by Justice Kennedy for the plight of America's long-term condemned, who now wait years before their executions.[121] Indeed, these conditions recall the words of *Macbeth*'s first witch, who reported to her grim comrades on one poor object of her dark magic:

> I will drain him dry as hay.
> Sleep shall neither night nor day
> Hang upon his pent-house lid;
> He shall live a man forbid.
> Weary se'nnights nine times nine
> Shall he dwindle, peak and pine.[122]

III. CONCLUSION: THE CURRENT COURT

Let me sum up. Presently, in my view, four Justices are expressly and strongly disposed to consider a broad challenge in the near future, to either the American death penalty itself or, at a minimum, to its use in those states that have written capital statutes that make "death-eligible" a very high fraction of all intentional homicides.[123] To these four Justices, evidence of

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118. Davis v. Ayala, 135 S. Ct. 2187, 2193, 2197–2208 (2015); Batson v. Kentucky, 476 U.S. 79, 100 (1986).

119. *Davis*, 135 S. Ct. at 2208.

120. *Id.* at 2210 (citations omitted).

121. *Time on Death Row*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/time-death-row (last visited Jan. 6, 2019).

122. WILLIAM SHAKESPEARE, MACBETH act 1, sc. 3, ll. 18–23.

123. *See supra* notes 63–69 and accompanying text (discussing the eight-page statement denying certiorari in the *Hidalgo* case).

such a pattern would apparently violate not only the language and rationale of *Furman v. Georgia* in 1972 but also the core assumptions and many subsequent statements by the Court, which have assumed such narrowing is indispensable—as Justice Kennedy himself expressly reaffirmed in *Roper v. Simmons* and *Kennedy v. Louisiana*.[124]

Moreover, the very concerns about the contemporary death penalty that Justice Breyer voiced in *Glossip v. Gross*—"(1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose"—have elsewhere motivated Justice Kennedy's decisions in *Roper*, *Kennedy*, and several cases in which Justice Kennedy condemned not capital punishment but sentences of life without parole for juvenile offenders.[125] First, in prohibiting a sentence of life without the possibility of parole for non-homicidal offenses committed by juveniles in *Graham v. Florida* in 2010 (a 6–3 opinion authored by Justice Kennedy).[126] Then second, even for homicide itself in *Miller v. Alabama* in 2012, by not permitting mandatory life sentences in homicide cases for individuals under eighteen.[127]

Still, in the end, this apparently headlong rush to predict a coming era of judicial abolition finds me cautious, even dubious. If I may be permitted one final allusion to Shakespeare's great play, let me recall that Macbeth, after returning home from his strange meeting with the witches to prepare to host the King as an overnight guest, counts out the moral claims—kinship, citizenship, the obligations of hospitality, and the virtuous qualities of King Duncan—that would be visibly violated by "the horrid deed" of murder he is contemplating against the sovereign.[128] With resolve, he announces to Lady Macbeth, "We will proceed no further in this business," only to be mocked and goaded into moving forward:

> Macb[eth:] If we should fail?
> Lady M[acbeth:] We fail!
> But screw your courage to the sticking-place,
> And we'll not fail.[129]

Like Macbeth, the Supreme Court has itself looked upon stern arguments against infliction of the death penalty—repeated failures of state

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124. Kamin & Marceau, *supra* note 30 (discussing the *Furman* narrowing requirement); *see supra* notes 103–114 and accompanying text (discussing Justice Kennedy's two-step analysis used in *Roper* to strike down the death penalty for juveniles and employing a narrow requirement for crimes deserving of the death penalty in *Kennedy*).

125. Glossip v. Gross, 135 S. Ct. 2726, 2756 (2015) (Breyer, J., dissenting); Kennedy v. Louisiana, 554 U.S. 407 (2008); Roper v. Simmons, 543 U.S. 551 (2005).

126. Graham v. Florida, 560 U.S. 48, 51–53, 82 (2010).

127. Miller v. Alabama, 567 U.S. 460, 465 (2012). A 5–4 opinion authored by Justice Kagan, joined by Justices Kennedy, Ginsburg, Breyer, and Sotomayor. *Id.*

128. WILLIAM SHAKESPEARE, MACBETH act 1, sc. 7, l. 24.

129. *Id.* act 1, sc. 7, ll. 31–32, 58–62.

regulatory sentencing systems to identify "the worst of the worst" in the post-*Furman* era, persistent racially discriminatory patterns and acts, and sobering instances in which innocents have been exonerated while awaiting the death chamber.[130] The Court is inescapably aware, not simply through studies and statistics but through its own repeated experiences in sorting through petitions, briefs, and arguments, of the infirmities that bring the death penalty into grave question and disrepute.[131] Yet, it has nonetheless long persisted, albeit without great positive conviction, in allowing the imposition of this most dubious penalty, even if "full of sound and fury, [s]ignifying nothing."[132] It is quite clear that the current Executive and Legislative leadership, as of early fall 2018, seem resolutely opposed to further federal judicial intrusion into state penal choices.[133] The more distant future is beyond anyone's knowing. Past history suggests that, in reaching it, we will travel no straight or predictable path.

130. *See supra* notes 27–30, 52–55 and accompanying text (detailing concerns presented by anti-death penalty advocates).

131. *See supra* notes 46–47, 49–55, 57–59, 69, 79, 100–101, 104, 107, 114–117 and accompanying text (discussing death penalty cases).

132. MACBETH act 5, sc. 5, ll. 27–28.

133. *See supra* notes 40–45 and accompanying text (considering the acts of political leadership in respect to Supreme Court appointments).